



Memorandum

To : Mr. Robert Donay
Assessment Standards Division

Date : April 10, 1989

From : Eric F. Eisenlauer

Subject : P.I. Valuation of City-Owned Parking Lot

This is in response to your recent memo to me in which you request our opinion whether a taxable possessory interest was created under the circumstances described in your memo and materials submitted therewith and set forth below.

FACTS

By grant deed (the "Deed") dated April 12, 1978, the Redevelopment Agency of the City of Seaside (the "Grantor") sold and conveyed a landlocked parcel of land (the "Land") containing an area of 161,782 square feet to Elliott M. Caplow (the "Grantee") who subsequently built a K-Mart store on the site and leased the property to K-Mart on a long term lease. The lease was triple net for a fixed annual sum plus a percentage of annual gross sales over \$10,000,000. The Deed also granted certain easements to Grantee to use the Parking Site, a vacant parcel of approximately six acres owned by the Grantor located adjacent to the Land. The site conveyed to Caplow comprised 67.8 percent of what the Deed referred to as the Shopping Center Site. It is our understanding that the Grantor made similar conveyances of the remaining parcels comprising the Shopping Center Site.

The easements were on, under and over the Parking Site for such purposes as the installation and maintenance of utilities necessary or appropriate to provide utility service to the Shopping Center Site; and for erecting, constructing, maintaining and operating signs and other facilities to provide proper advertisement of and direction for business establishments located on the Shopping Center Site. The term of the foregoing easements is perpetual.

More importantly, the Grantor also conveyed "'common use easements' on and over the entire Parking Site for the purpose of ingress and egress by any pedestrians, automobiles, trucks and any other vehicles to and from the Shopping Center Site or any portion thereof by traversing over and upon the Parking Site in any direction to or from any point on the common boundaries of the

Shopping Center Site and the Parking Site and for the purpose of parking such automobiles, trucks and any other vehicles thereon."

The easement rights so granted were for a term of 75 years and included the power on the part of the Grantee and his successors and assigns to grant licenses for the use of the easement rights to the operators of business establishments located on the Land and their respective employees, patrons and invitees.

The rights of usage under the common use easements are characterized in the Deed as non-exclusive, and in common with the rights of usage of each owner of or licensee under such rights and with all members of the public having the right or privilege for like usage of the Parking Site under the terms of a 75-year Facility Lease to the City of Seaside (the "Operator") which pursuant to the lease was to operate and maintain the Parking Site as a municipal parking lot. The Facility Lease was entered into soon after the Deed was recorded. The Parking Site improvements were installed at the expense of the Grantor or its assignee.

The Deed also contains covenants by the Grantor and Grantee which bind them and their successors and assigns to the effect that the Parking Site shall be held in trust by the Grantor and dedicated for a term of 75 years to public use as a municipal parking lot available to the public without charge on all days and at all hours.

With respect to a total taking of the Parking Site through eminent domain proceedings, the parties agreed that Grantor was to "receive out of the award for such taking an amount equal to its unpaid indebtedness for the cost of improvements and unpaid costs of operation and maintenance of the Parking Site incurred by it, less the amount held by it for such purposes. The balance of the award for such taking shall be apportioned between Grantor and Grantee, and their respective successors and assigns, as their respective interests may be determined by the Court."

In the event of a partial taking, Grantor agreed to the extent permitted by law to provide multilevel parking on the remaining portion of the Parking Site equivalent to the parking capacity lost as a result of the partial taking. In that event, Grantor was to be entitled to reimbursement of the cost of providing multilevel parking from the condemnation award with any balance apportioned as above.

The Grantee further agreed for himself and his successors and assigns that the owner of the Land would reimburse the Operator of the Parking Site for such owner's proportionate share of the expenses incurred by the Operator for repair and maintenance, utility service, lighting, cleaning, trash removal, policing,

inspecting, liability insurance premiums and all costs other than those which are properly charged to capital account under generally accepted accounting principles. The Grantee's share of such expenses is in the same proportion as the Land area is to the Shopping Center Site area, i.e., 67.8 percent.

DISCUSSION

Article XIII, section 1, of the California Constitution requires that all property be taxed unless otherwise provided by the California Constitution or the laws of the United States. Possessory interests in real property are deemed to be real property for tax purposes. (Forster Shipbuilding Co. v. County of Los Angeles (1960) 54 Cal.2d 450, 455.) Also, Revenue and Taxation Code section 104 classifies the right to use or possess land as real property. Section 107 defines "possessory interests" in pertinent part as "[p]ossession of, claim to, or right to the possession of land or improvements, except when coupled with ownership of the land or improvements in the same person."

Property Tax Rule 21 interprets section 107 and provides in relevant part that a "possessory interest" is "an interest in real property which exists as a result of possession, exclusive use, or a right to possession or exclusive use of land and/or improvements unaccompanied by the ownership of a fee simple or life estate in the property." (Property Tax Rule 21(a).) A "taxable possessory interest" is "a possessory interest in non-taxable publicly owned real property. . . ." (Property Tax Rule 21(b).)

The rationale behind the taxation of possessory interest is that "[t]hese possessions . . . are recognized as a species of property subsisting in the hands of the citizen. It is not the land itself, nor the title to the land It is not the preemption right, but is the possession and valuable use of the land subsisting in the citizen. Why should it not contribute its proper share, according to the value of the interest, . . . of the taxes necessary to sustain the Government which recognizes and protects it?" (People v. Shearer (1866) 30 Cal. 645, 657.)

In determining the existence of a taxable possessory interest under a written instrument, an objective standard rather than the literal language of the written instrument controls in ascertaining the nature of the relationship established. Because of the variety of interests that may be created by written instruments, the question of whether a taxable possessory interest has been created must be decided on a case-by-case basis by weighing the factors of durability, exclusiveness, private benefit and independence. In each case, judgment is to be made by an examination of the writing in its entirety. (Stadium Concessions,

Inc. v. City of Los Angeles (1976) 60 Cal.App.3d 215; Wells National Services Corp. v. County of Santa Clara (1976) 54 Cal.App.3d 579; Mattson v. County of Contra Costa (1968) 258 Cal.App.2d 205; see also Property Tax Rule 21(a)(1) which provides that a possessory interest may exist as the result of a grant of an easement as well as a grant of a leasehold estate.) In order to determine whether a taxable possessory interest has been created in this case, it is necessary to analyze the Deed in light of the standard set forth above.

Durability

To satisfy the requirement of durability, the agreement must confer use for a determinable period and the use has to be reasonably certain to last for that period. (Kaiser Co. v. Reid (1947) 30 Cal.2d 160.)

The common usage easements in this case were created 13 years ago for a term of 75 years. There is little question that the factor of durability is satisfied in this case. See Mattson, supra, wherein a term of 5 years was held to be sufficiently durable.

Independence

To qualify as a possessory interest, the right to use property must be sufficiently exclusive, durable and independent of the public owner to constitute more than an agency. (Pacific Grove-Asilomar Operating Corp. v. County of Monterey (1974) 43 Cal.App.3d 675, 684.) "If, in practical effect, one of the parties has the right to exercise complete control over the operation, an agency relationship exists; . . ." (Nichols v. Arthur Murray, Inc. (1967) 248 Cal.App.2d 610, 613.) As a general proposition, if exclusiveness and private benefit are present, the other requirements (durability and independence) are usually found to exist as well. (See Freeman v. County of Fresno (1981) 126 Cal.App.3d 459, 463.)

The Parking Site is being operated by the City of Seaside under a lease from the Grantor or its assignee, however the use of the Parking Site as a customer parking lot by the owners of the Shopping Center Site is independent of the owner of the Parking Site or the city of Seaside. Accordingly, it is clear, in our opinion, that neither the Grantee nor his successor in interest is an agent of the owner of the Parking Site under the circumstances here and the factor of independence is satisfied.

Private Benefit

The requirement of private benefit is met if there is an opportunity for the holder of the interest to make a profit.

(Wells Nat. Services Corp. v. County of Santa Clara, supra, at p. 585.)

The use of the Parking Site by the owners of the parcels comprising the Shopping Center Site is essentially the same as it would be if the owners owned or leased the Parking Site but without the costs of owning or leasing. Moreover, it is unlikely that the revenues derivable from their use of the Shopping Center Site would be as high without such customer parking. It therefore seems clear that the use of the Parking Site as a customer parking lot is one which is profitable to the owners of the Shopping Center Site. Accordingly, we are of the opinion, that the use of the Parking Site constitutes a valuable private benefit to the owners of the Shopping Center Site.

Exclusiveness

In Kaiser Co. v. Reid, supra, the court drew a distinction between a lease which was a possessory interest and a license which was not. Under the Kaiser test, "exclusive" meant exclusive against the entire world including the rightful owner, supra, at page 619. In more recent times, however, the Kaiser requirements for finding a possessory interest including the requirement of "exclusiveness" have been applied in a less demanding way. Freeman v. County of Fresno, supra.

For example, in Mattson v. County of Contra Costa, supra, the court upheld a possessory interest based upon the right to operate a refreshment stand and clubhouse at a municipal golf course. The court stated that despite the freedom of the public (customers as well as non-customers) to enter the dining area, the taxpayer's possession was sufficiently exclusive and suggested that such public access may actually enhance the taxpayer's interest. Similarly, in Sea-Land Service, Inc. v. County of Alameda (1974) 36 Cal.App.3d 837, the court found a taxable possessory interest in plaintiff's right to use public port facilities despite plaintiff's claim that such use was non-exclusive because the state had the right to use the premises for any vessel or other watercraft it owned or operated and further because the public also had access to the property under the Tidelands Act. See also Board of Supervisors v. Archer (1971) 18 Cal.App.3d 717 (federal grazing permits held to be a possessory interest despite being non-exclusive); Lucas v. County of Monterey (1977) 65 Cal.App.3d 947 (preferred right to dock boat in harbor berth at a public harbor held to be a possessory interest despite fact that when the boat was absent, the harbor could rent the space to others and assign plaintiff's boat to other berths when plaintiff's berth was occupied by other boats). As appropriately stated by the court in Lucas "[a]lthough Kaiser Co. v. Reid [supra] . . . defines 'possessory interest' as 'exclusive use,' 'exclusive' has been given broad interpretation by the courts."

The test for exclusiveness therefore is no longer exclusive possession against all the world including the owner. The fact that a right of possession to some extent must be shared with others does not mean per se that there is no taxable possessory interest. (Wells Nat. Services Corp. v. County of Santa Clara, supra, at p. 584.) The right of use, however, must carry with it the degree of exclusiveness necessary to give the user something more than a right in common with others . . . so that it can be said, realistically, that the occupancy or use substantially subserves an independent, private interest of the user or occupier. (United States of America v. County of Fresno, supra, at p. 638.) To be exclusive, such use must be "more than a right shared with the general public" and has been described as a "special right of access for profit" Freeman v. County of Fresno, supra, at page 464. (Cf. Scott-Free River Expeditions, Inc. v. County of El Dorado (1988) 293 Cal.App.3d 896, wherein the court found that the right of the general public to use a river did not affect the exclusivity of plaintiff's possessory interest as only plaintiff's had a right of access for profit through their county permit to make commercial use of the river as rafting outfitters.

Under the common usage easements granted in this matter, the Grantee, his successors and assigns and licensees thereunder including K-Mart can use the Parking Site for employee and customer parking. Although such rights are said to be non-exclusive and in common with members of the general public because the Parking Site is a municipal parking lot, the Grantee as well as the owners of other parcels comprising the Shopping Center Site received something more than the general public in our opinion. The owners, or operators pursuant the common usage easements granted to them or for their benefit have a special right of access for profit not shared by the general public through their utilization of the Parking Site for the benefit of their adjoining properties. The public's use of the Parking Site is consistent with and in no way diminishes this use and in fact enhances it (Mattson, supra).

Moreover, the fact that the owners can share in condemnation awards in the event of a partial or total taking of the Parking Site indicates that their rights in the Parking Site are greater than and distinguishable from those of the general public. Further indication that the owners of the Shopping Center Site have something more than a right in common with others in their use of the Parking Site is the fact that they are to reimburse the Operator of the Parking Site their proportionate share of the expenses of operating the Parking Site. The fact that several owners share the use of the Parking Site for customer parking would not affect the factor of exclusiveness under the authorities cited above. See also Property Tax Rule 21(e).

Robert Donay

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Based on the foregoing, we are of the opinion that the element of exclusiveness has been satisfied in this case.

In summary, it appears that the use of the Parking Site pursuant to the rights created by the Deed in this case is sufficiently durable, independent exclusive and confers such a valuable private benefit that it can reasonably be concluded that a taxable possessory interest was created in the Parking Site in favor of the owner of the subject property.

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cc: Mr. John W. Hagerty
Mr. Robert H. Gustafson
Mr. Verne Walton